No. 10574.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

JACK W. BAGLEY,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Notice of Motion to Remand Cause, Motion, Affidavit and Memorandum of Points and Authorities in Support Thereof.

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TOPICAL INDEX.

TABLE OF AUTHORITIES CITED.

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FOR THE NINTH CIRCUIT

JACK W. BAGLEY,

Appellant,

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Appellee.

Notice of Motion to Remand Cause.

To Frank J. Hennessey, United States Attorney, and Joseph Karesh, Assistant United States Attorney, Attorneys for Appellee:

You and each of you will please take notice that the appellant will move the Court for an order remanding the above entitled cause to the United States District Court for the Southern District of California, Central Division, in the court room of said Court in the Post Office and Federal Building, San Francisco, California, on the 27th day of May, 1944, at 10:00 A. M. or as soon thereafter as counsel may be heard.

The appellant will rely upon the affidavit of Jack W. Bagley, the transcript of record on file in the above entitled cause, and the memorandum of points and authorities submitted herewith.

A. L. Wirin and
J. B. Tietz,
Wayne M. Collins,
Theodore Tamba,
By A. L. Wirin,
Attorneys for Appellant.

No. 10574.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

JACK W. BAGLEY,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Motion to Remand.

The appellant, Jack W. Bagley, moves the Court for an order to remand the above entitled cause to the United States District Court for the Southern District of California, Central Division, with instructions that said District Court proceed with the cause pursuant to the decision of the Supreme Court of the United States in *Billings v. Truesdell,* decided March 27, 1944.

A. L. WIRIN and
J. B. TIETZ,
WAYNE M. COLLINS,
THEODORE TAMBA,
By A. L. WIRIN,
Attorneys for Appellant.

No. 10574.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

JACK W. BAGLEY,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Affidavit of Jack W. Bagley in Support of Motion to Remand.

United States of America, State of California, County of San Francisco—ss.

Jack W. Bagley, being first duly sworn, deposes and says:

That he is the appellant in the above entitled cause and appeal.

That the appellant was convicted in the Court below under an indictment filed August 3, 1943, which charged the appellant with having knowingly and feloniously failed to comply with an order of his local Draft Board on or about the 17th day of July, 1943, to report for induction into the Land or Naval Forces of the United States. In

said order to report for induction [Tr. of Record 58] the affiant was advised that upon his reporting to his local Board on said 17th day of July, 1943: "You will there be examined and if accepted for training and service you will then be inducted."

On or about said 17th day of July, 1943, the affiant understood, was of the belief, and had been advised that upon reporting to his local Draft Board as directed so to do by the order of induction [Tr. of Record 58], he thereby voluntarily surrendered to and became a part of the Armed Forces of the United States Army; that the affiant, as a conscientious objector, was unable to thus surrender to the United States Army and become a part thereof.

The affiant did not discover until the date of this affidavit that a registrant under the Selective Training and Service Act, ordered to report for induction does not become a member of the Armed Forces until and unless he takes the oath administered to the inductees.

The affiant is willing at this time to comply with the order to report for induction heretofore issued by his local Draft Board, or any new order to report for induction which may be issued by his local Draft Board up to the point of actually becoming a member of the United States Army; and the affiant is willing to take any other steps, up to said point of submission to said United States Army, so far as are now known to the affiant, which he may be ordered to take, short of and other than, such actual submission to said Army.

The affiant is willing to take such steps in order to exhaust all administrative steps and procedures in order to secure a judicial review of the action of the Selective Service Agencies which said action the affiant has claimed, and believes, to be in violation of his rights to due process of law, and in violation, by said Selective Service Agencies, of both the constitutional and the Selective Training and Service Act and Regulations adopted pursuant thereto.

Had the affiant, on or about July 17, 1943, known or been advised that reporting as directed by his local Draft Board, without taking the oath, would have continued civil, as distinguished from military jurisdiction over the affiant; and had the affiant known or been advised that such a report on his part to the place directed in said order was necessary in order to secure a judicial review of the arbitrary action of the Selective Service Agencies, the affiant would have so reported.

JACK W. BAGLEY.

Subscribed and sworn to before me this.....day of May, 1944.

.....

Notary Public in and for Said County and State.

No. 10574.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

JACK W. BAGLEY,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Memorandum of Points and Authorities in Support of Appellant's Motion to Remand.

Preliminary Statement.

On March 27, 1944, the Supreme Court of the United States in *Billings v. Truesdell,* for the first time outlined and clarified the appropriate and necessary procedural steps within the Selective Service System for a registrant to take in order to exhaust the administrative remedies within that administrative system to permit a judicial review of alleged arbitrariness by the Selective Service Agencies.

The import of the *Billings* decision is that a registrant who complies with an order of induction to the extent of reporting for induction without, however, taking the oath administered to selectees, has so far exhausted his admin-

istrative steps so as to be entitled to a judicial review. Prior to the *Billings* decision the law was in a state of precarious uncertainty; this Court did not speak upon the subject; not until *Falbo v. United States,* 320 U. S. 549, decided January 3, 1944, did the Supreme Court pass upon the question.

The appellant was indicted (prior to the *Billings* and *Falbo* decisions) on August 3, *1943* [Tr. of Record 2]. He was charged with having violated a local Draft Board order issued on or about the 17th day of July, *1943.*

As appears from the affidavit of the appellant, filed concurrently with the instant motion and this memorandum, he did not comply with the order because, in effect, he did not anticipate in *1943,* the import of the Supreme Court ruling in the *Billings* case in *1944.* Had the appellant known, or been advised, or guessed accurately what the Supreme Court would decide in 1944, namely, that it was necessary for him to comply with the order of his local Board for induction to the point of refusal to submit to the oath, he would have done so. This the appellant is willing to do now. Hence the instant motion to remand the cause to the trial court in order that the appellant, as well as the trial court, may be afforded an opportunity to permit the appellant to follow the procedural steps within the Selective Service System outlined by the Supreme Court in the *Billings* case as a condition precedent to judicial review of the unconstitutional, illegal, and arbitrary action by the Selective Service Agencies alleged by the appellant.

Accordingly, the instant motion poses the question to be stated below:

Question Stated.

Is it appropriate for a Court of Appeals to remand a cause to the trial court in order to afford that Court and the appellant an opportunity to comply with a decision of the United States Supreme Court outlining procedural steps a registrant under the Selective Training and Service Act must follow in order to secure judicial review of an allegedly arbitrary and illegal classification, when the appellant failed to take such steps because of the uncertainty of the law upon the subject at the time of the original prosecution against him?[1]

Point 1: The Effect of Billings v. Truesdell.

In the *Billings* case the Supreme Court, for the first time, undertakes to outline the procedural steps which a registrant under the Selective Training and Service Act must take and complete before he may be entitled to judicial review of an alleged arbitrary classification by the Selective Service Agencies.

One who reports to an induction station pursuant to an order of a local Draft Board so to do, follows the procedure outlined in the *Falbo* case for exhaustion of admin-

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[1]Put more challengingly, should a layman be punished for having failed to guess accurately the effect of a Supreme Court decision? Or will a Court of Appeals, in the administration of justice, direct his relief from his having guessed erroneously by remanding the cause to the trial court with appropriate instructions?

istrative remedies. In the *Billings* case the Supreme Court thus put it:

> "It should be remembered that he who reports at the induction station is following the procedure outlined in the *Falbo* case for exhaustion of his administrative remedies. Unless he follows that procedure he may not challenge the legality of his classification in the courts. It follows that one who follows that procedure has exhausted all necessary administrative steps, and may then challenge an order in the courts."

Otherwise, said the Court in the *Billings* case, the *Falbo* decision would make that case a "trap . . . by subjecting those who reported for completion of the Selective Service process to more severe penalties than those who stayed away in defiance of the board's order to report."

Point 2: In the Exercise of Its Appellate Jurisdiction a Court of Appeals May Consider a Change in the Law Which Has Supervened Since the Judgment in a Trial Court, and Make Such Disposition of the Case as Justice Requires, Including the Remanding of the Cause to the Trial Court With Appropriate Instructions.

In *Patterson v. Alabama,* 294 U. S. 600, 607, the Supreme Court, through Chief Justice Hughes, thus reviewed the law:

> "We have frequently held that in the exercise of our appellate jurisdiction we have power not only to correct error in the judgment under review but to make such disposition of the case as justice requires.

> "And in determining what justice does require, the Court is bound to consider any change, either in fact or in law, which has supervened since the judgment was entered. We may recognize such a change, which may affect the result, by setting aside the judgment and remanding the case so that the state court may be free to act." (Citing numerous cases.)

More recently the Supreme Court in *New York ex rel. Whitman v. Wilson,* 318 U. S. 688, 690, recognized a change in the law resulting from a state court decision as making it "appropriate to vacate the judgment and to remand the cause to the state court for its determination in the light of that decision, and for such further and other proceedings as may be deemed advisable."

The Supreme Court applied the same principle in *State Tax Commission of Utah v. Van Cott,* 306 U. S. 511.

In *Villa v. Van Schaick,* 299 U. S. 152, 155, the Supreme Court expressed the same view:

> "We have frequently said that in the exercise of our appellate jurisdiction we have power not only to correct errors in the judgment under review but to make such disposition of the case as justice requires. In determining what justice does require we have considered changes, either in fact or in law, supervening since the judgment was entered and in such cases we have set aside the judgment and remanded the cause so that the state court might be free to act."

To the same effect are:

Missouri ex rel. Wabash Railway Co. v. Public Service Commission, 273 U. S. 126, 131;

Watts, Watts & Company v. Unione Austriaca Di Navigazione, 248 U. S. 9;

Gulf v. Dennis, 224 U. S. 503, 507.

The approach of the Supreme Court to the administration of justice finds its counterpart in the action of this Court in *Gross v. United States,* 136 Fed. (2d) 878. In that case this Court acknowledged its broad authority of judicial supervision over the administration of criminal justice in the Federal District Courts by reversing a cause, on its own motion, upon a point not urged by the appellant in the trial court.

McNabb v. United States, 318 U. S. 332, is in accord.

Conclusion.

The motion to remand should be granted in the interests of a fair and full administration of justice. If the appellant has been deprived of the right to a judicial review of administrative action claimed by him to be in denial of due process, because he failed to divine accurately what the Supreme Court might at some later time determine to be the technically correct administrative steps for him to take, it is not now too late for this Court to accord to the appellant the right to a full and fair "day in court." To paraphrase the language of the Supreme Court in *Monogahela Bridge Co. v. United States,* 216 U. S. 177, 195, the appellate courts of the United States have rarely, if ever, felt themselves so restrained by technical rules that they cannot find some remedy consistent with the law and justice, to relieve a defendant charged with crime for

having guessed wrong as to what to do—particularly when all the lawyers in the country, and most of the judges, also guessed wrong.[2]

Respectfully submitted,

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By A. L. WIRIN,
Attorneys for Appellant.

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[2]Should this Court determine to remand the cause, the incidental problem will then arise as to what instructions this Court should give to the District Court.

This Court might well direct that the indictment be dismissed. Such a dismissal, would not result in immunizing the appellant from further liability under the Selective Training and Service Act, either from the authority of the Selective Service Agencies to reprocess the appellant, nor of the civil courts to entertain criminal prosecutions in the event of a claimed violation of any order made by any Agency under that Act. But upon such reprocessing by the Selective Service Agencies, in the light of the *Billings* decision, the appellant would then exhaust all of the administrative steps required of him so as to be entitled to judicial review in the event of a further arbitrary classification by the Selective Service Agencies. Then the appellant would be in a position under the *Billings* case, in the event of a prosecution against him for a violation of such an order, to defend against such order by demonstrating its arbitrariness and illegality. Surely the appellant is entitled to such a "day in court." Anything less than that reflects upon the administration of justice in the Federal Courts, as well as the fairness of the administration of the Selective Service System itself.

In the alternative, this Court could remand the cause for retrial. Upon such a retrial the appellant might defend on the ground that his failure to report was not "knowingly and feloniously," as charged in the indictment; that he failed to report as ordered because of a mixed mistake of law and of fact.

That a mistake of fact constitutes a good defense to an indictment charging an offense requiring express intent is well recognized. That a mistake in law, under special circumstances, may equally avail as a defense is recognized when that mistake may disprove the existence of a required specific intent. See *Townsend v. United States* (Dist. of Col. Ct. of App., 1938), 95 F. (2d) 352, including the noteworthy dissent by Justice Stephens. *Cf.* also, cases cited in the *Townsend* decision including *United States v. Murdock*, 290 U. S. 389, 393, 396.